as their property, having purchased them from Moran.

Mr. Dalton refused to grant orders for writs of replevin on the ground that section 2 of the Replevin Act precluded replevin under such circumstances. From this decision the applicants appealed to a judge. The matter was then argued before Mr. Justice Gwynne, who, reversing the decision of Mr. Dalton, ordered writs of replevin to issue. The further facts of the case appear in following judgment of

GWYNNE, J.—These were two summonses by way of appeal from two orders made by Mr. Dalton in these cases, whereby he discharged two several summonses asking for writs of replevin to issue in these suits, and refused to grant the writs of replevin upon the ground that the goods sought to be replevied were in the custody of Mr. Kerr, an official assignee, as guardian, under a delivery to him, by the sheriff, of the goods in question, seized under a writ of attachment issued from the County Court in compulsory liquidation against one Moran, an insolvent.

The evidence offered upon affidavits by the applicants is strong to show, and conclusive, if not contradicted, that the goods in question, namely divers kilns of bricks, were the property respectively of the applicants. No affidavits are offered in opposition to the title set up by them; it may be that Mr. Kerr, being official assignee, can admit nothing. The case, therefore, stands thus: that the evidence of title offered by the applicants, although not admitted, is not denied; the property seized is shown to be of that nature that, having regard to the business of the respective applicants, namely that of builders, they may be exposed to very serious injury if the property should not be restored to them, which any damages which they might recover in actions of trespass would not reimburse them for, and Mr. Dalton, I am informed by himself, felt this so strongly that he would have granted the writs without hesitation, if he had not considered himself fettered by the language of the second section of the Replevin Act, Consolidated Statute U. C. ch. 29.

By that section it is provided that "the provisions herein contained shall not authorize the replevying of or taking out of the custody of any sheriff or other officer any personal property seized by him, under any process, issued out of any court of record for Upper Canada." The section is consolidated from 18 Vict ch. 118. In order to put a correct construction upon this section, it will be necessary to consider what was the law before the passing of the Act from which this section is taken, for the purpose of consolidation, and what was the object of the Act.

Although it was held in England in the cases collected and cited in *Hurling* v. *Mayville*, 21 C. P. 499, that replevin lay for *any wrongful taking* of property from the possession of the true owner, still it never lay where the taking was in execution under a judgment of a superior court, and the reason is given by Parke, B., in *George* v. *Chambers*, 11 M. & W. 160, citing Chief Baron Gilbert's treatise on Replevin, p. 188, as his authority, where it is said, "If a superior court award an execution, it seems that no replevin lies for goods taken by the sheriff by virtue of the execution; and if any person shall pretend to take out a replevin and execute it, the court of justice would commit him for contempt of their jurisdiction, because by every execution the goods are in the custody of the law, and the law ought to guard them, *and it would be troubling the execution awarded, if the party upon whom the money was to be levied, should fetch back the goods by replevin*, and therefore they construe such endeavour, to be a contempt of their jurisdiction, and upon that account commit the offender; that is, if a person attempt to defeat the execution of the court, they will treat it as a contempt, and punish it by attachment of the sheriff." In *Rex* v. *Monkhouse*, 2 Str. 1184, the court granted an attachment against a sheriff for granting a replevin of goods distrained on a conviction for deer stealing, for the reason that the conviction was conclusive and its legality could not be questioned in replevin; and in *Earl Ridnor* v. *Reeve*, 2 Bos. & Pul. 391, the court said that it had been determined that when a statute provides that the *judgment* of commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way; and so not in replevin.

In *Pritchard* v. *Stephens*, 6 T. R. 522, where goods taken under a warrant of distress granted by commissioners of sewers were replevied, and the proceedings in replevin moved into the King's Bench, the court refused to quash the proceedings, leaving it to the defendant in replevin to put his objection in a formal manner on the record. In that case Callis is cited, p. 200, where he says, "If upon a judgment given in the King's Court, or upon a decree made in the court of sewers, a writ or warrant of *distringas ad reparationem* or of that nature be awarded, and the party's goods be thereby taken, these goods ought not to be delivered to be taken either out of this court or out of any other court of the King, *because it is an execution out of a judgment*," and it is said there, citing another passage of Callis, p. 197, that there is a distinction between those goods that remain in the custody of the officer under the seizure and those that afterwards come into the hands of a purchaser, saying that the former are not repleviable; however, the court refused to quash the proceedings, leaving the defendant to raise his defence upon the record, although the goods were replevied out of the hands of the officer acting under the decree and warrant of the court of sewers.

Thus, then, the law stood in England, that for any wrongful taking a replevin lay except where the taking was in execution under a judgment of a superior court, or of an inferior tribunal whose judgment was by statute made final and conclusive, to which may be added the further exception where the taking was in order to a condemnation under the revenue laws: *Cawthorne* v. *Camp*, 1 Anst. 212, or for a duty due to the crown: *Rex* v. *Oliver*, Bun. 14, and the reason of the law that goods taken in execution could not be replevied was that it could not be endured that the cause of justice should be frustrated by permitting the party, *upon whom the money was to be levied*, in satisfaction of a judgment of a superior court, or of a judgment